Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-806

TEXAS STEEL COMPANY,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, DISTRICT 776

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES L. HICKS, JR.
MULLINAX, WELLS, MAUZY & BAAB, INC.
Suite 200, 8204 Elmbrook Drive
Dallas, Texas 75247

PLATO E. PAPPS
1300 Connecticut Avenue
Washington, D. C. 20006

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Preliminary Statement	1
Questions Presented	2
Statement of the Case	2
Argument—Reasons for Denying the Writ	3
Conclusion	6

Table of Cases

Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970) 5

Buffalo Forge v. United Steelworkers of America, — U.S. —, 96 S.Ct. —, 49 L.Ed.2d 1022 (1976) 5

United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960) 3

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 3, 4

United Steelworkers v. Warrior and Gulf Nav. Co., 363 U.S. 574 (1960) 2, 3, 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-806

TEXAS STEEL COMPANY,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, DISTRICT 776

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent, International Association of Machinists and Aerospace Workers, District 776, adopts those portions of the Petition filed by Texas Steel Company headed "Opinions Below"; "Jurisdiction" and "Statutory Provisions Involved."

QUESTIONS PRESENTED

The only question of any color raised by the Petition is:[1]

> Whether the Court of Appeals erred in applying the test of substantive arbitrability established by this Court in *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960) to determine whether the dispute at hand was arbitrable under the parties' collective bargaining agreement.

STATEMENT OF THE CASE

But for one additional matter Petitioner's Statement of the Case is sufficient. For sake of certainty and disposition of all issues posed by Petitioner it is important to note that the gravamen of the grievance submitted to the arbitrator was whether the newly created "loadout leadman" was being paid correctly under the provisions of the parties' contract.[2] In both his initial and supplemental award the arbitrator concluded that resolution of the grievance turned upon "whether Grievant Hurry does in fact serve as leadman to the Crane Operators as well as the ground crews." (Pet. App. p. A-2 and A-9.)[3] Contrary to Petitioner's assertions (Petition pages 6-10), neither the issue before the arbitrator or its resolution involved the right of the employer to create new job classifications.

---

[1] Petitioner raises other issues relating to the propriety of the arbitrator's decision and the Court of Appeals remand to the District Court for resolution of questions material to granting attorneys fees. The resolution of these issues is firmly supported in the decision below and do not, therefore, warrant response here.

[2] Appendix A, page 43 of the contract set forth on page A-47 of the appendix following the Petition requires: "Leadman classification shall be at least $.20 above the highest led classification rate."

[3] References to the appendix to Petition will be by notation "Pet. App." followed by appropriate pagination.

ARGUMENT

Reason for Denying the Writ—the Decision of the Fifth Circuit Court of Appeals Does Not Conflict With the Decisions of This Court.

The parameters of judicial review of labor arbitration awards were clearly established by this Court sixteen years ago in a series of decisions known as the "Steel Workers Triology."[4] The Fifth Circuit Court of Appeals remained true to those principles in its decision below (Pet. App. A-32 to A-44). In resolving the first issue—whether the award was based upon the arbitrator's interpretation of the contract—the Circuit Court properly refused Petitioner's invitation to review the "intrinsic merits" of the award and concluded that the arbitrator had, indeed, acted within his bounds (Pet. App. A-39 to A-41). That part of the decision is so patently proper that no further discussion is here necessary. The second question of "substantive arbitrability" was likewise properly tested and resolved by the Court below. Petitioner, however, seeks to convince this Court that the test of arbitrability used by the Fifth Circuit ought only to be applied where one party is seeking to force the other to arbitrate. Petitioner contends that in post-arbitration review some other, unspecified test of arbitrability ought to be applied. The result which Petitioner seeks is contrary to all existing case law and the federal labor policy.

The test of "substantive arbitrability" employed by the Fifth Circuit was broadly set forth in *Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960), to include all circumstances in which the duty to arbitrate might arise:

---

[4] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960) and; *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement.

. . .

The Congress . . . has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. . . . The judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (at 363 U.S. 578, 582-583)

In a companion decision, *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), the status of which was post-arbitration enforcement, this Court made specific reference to the tests set forth in *Warrior and Gulf* (at 363 U.S. 596). By so doing this Court implicitly rejected Petitioner's position.

Petitioner cites no cases supporting its position for none exist. Indeed, all courts have applied the *Warrior and Gulf* test without regard to whether arbitration has occurred.

The logic of applying the same test of arbitrability regardless of whether arbitration has occurred is unassailable. If different tests were used the result could be absurd. The same court using the *Warrior and Gulf* test to initially order arbitration could later be required using a second test to conclude that arbitration was not required by the contract. The parties would

thus be put by the court to futile arbitration, expense and delay. Clearly, requiring futile acts is not the function of Federal Courts.

Petitioner would have this Court enunciate a second, post-arbitration test of arbitrability reasoning that the need for the *Warrior and Gulf* test dissolves upon rendition of the arbitration award. Petitioner asserts that the *Warrior and Gulf* test of arbitrability serves to avoid strikes by submitting their causes to arbitration and that once the strike is averted the need for the test is gone. This argument falls of its own weight. If it is resolved after being initially ordered to arbitrate that the parties were not bound to arbitrate or adhere to the award, a strike could then occur and likely would occur when the smolderings of controversy are fanned by the frustration of having engaged in futile and time consuming arbitration.[5]

The Federal labor policy that favors industrial harmony is served not only by prompt submission of disputes to arbitration but also by adherence to arbitration awards once the duty to arbitrate is imposed. Having served both labor and management well for sixteen years there is no reason to disturb the *Warrior and Gulf* test now or to alter the decision of the Fifth Circuit.

---

[5] If the strike was not "over" a matter subject to arbitration (e.g., not substantially arbitrable) Federal Courts may not enjoin the strike. *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970); *Buffalo Forge Co. v. United Steelworkers of America*, — U.S. —, 96 S. Ct. —, 49 L.Ed.2d 1022 (1976).

CONCLUSION

Because the decision of the Fifth Circuit Court of Appeals comports in all respects with the decisions of this Court, a writ of certiorari must be denied.

Respectfully submitted,

JAMES L. HICKS, JR.
MULLINAX, WELLS, MAUZY
& BAAB, Inc.
Suite 200, 8204 Elmbrook Drive
P. O. Box 47972
Dallas, Texas 75247

PLATO E. PAPPS
1300 Connecticut Avenue
Washington, D.C. 20006